APPENDIX

Opinion of the Recorder's Court

IN THE

RECORDER'S COURT OF THE CITY OF COLUMBIA

CITY OF COLUMBIA,

—v.—

SIMON BOUIE and TALMADGE J. NEAL.

The Court: I'm prepared to hand down an opinion. In the case of *Stramack* (?) v. *Walker,* 149 Southeastern, Mr. Justice Cothran, who is one of the ablest members of the Supreme Court of this State, wrote the opinion of the Court and that was decided on August 27, 1929. This was a suit for damages where an individual remained in a building after having been ordered by the owner to depart. He refused to leave the building and was forcibly ejected by the owner. In this case Mr. Justice Cothran, speaking for the Court, said: "The law is well settled as thus expressed in our own case of *State* v. *Lazarus,* 1, Mills, Constitution 34: "The Prosecutor having business to transact with him, had a right to enter his house but if he remained after having been ordered to depart, might have been put out of the house. The defendant using no more violence than was necessary to accomplish this object and showing to the satisfaction of the Court and the jury, that this was his object." Now, I might add that in Second Ruling Case Law, 559, the law is stated very succinctly and very properly: "It is a well settled principle that the occupant of any house, store or other building, has the legal right to control

it and to admit whom he pleases to enter and remain there and that he also has the right to expel from the room or building anyone who abuses the privilege which has been thus given to him. Therefore, while the entry by one person on the premises of another may be lawful by reason of express or implied invitation to enter, his failure to depart on the request of the owner will make him a trespasser and justify the owner in using reasonable force to eject him." That's a quotation from Ruling Case Law and I think that law is well settled in South Carolina and I might say in the United States, and furthermore, under the case which I stated some time ago during the early part of the morning, the Circuit Court of Appeals has held that the private owner of a business has a perfect right to control it and to do business with anybody he pleases to do business with. That applies not only to Howard Johnson but I think in the case involved, which is Eckerd's, they've got a perfect legal right to do business and transact business with anybody they want to do business with, and if they invite them to leave and request them to leave and if they refuse to do it, then they have every right under the law to use such force as may be necessary to eject them.

It is therefore the opinion of this Court that the defendants are guilty, and the fine of the Court against Simon Bouie is $100.00 or 30 days, for trespassing, and I suspend $24.50 of that, and on resisting arrest, the fine of the Court is $100.00 or 30 days, of which amount the sum of $24.50 is suspended, said fines to run consecutively.

The judgment of the Court is in the case of Talmadge J. Neal, the fine of the Court is that he pay a fine of $100.00 or serve 30 days, provided that the sum of $24.50 is suspended.

Order of the Richland County Court

CITY OF COLUMBIA,

—v.—

SIMON BOUIE and TALMADGE J. NEAL.

These Appeals from the Recorder's Court of The City of Columbia were orally argued together before me and taken under advisement. The facts are largely undisputed. All of the Defendants are Negroes. Eckerd's Drug Store and Taylor Street Pharmacy are separate stores in The City of Columbia. Besides filling prescriptions, each sells drugs and sundries and has a section where lunch, light snacks and soft drinks are served. Trade is with the general public in all the departments except the lunch department where only white people are served.

On one occasion, Bouie and Neal went into Eckerd's and on another day the other Defendants went into the Taylor Street Pharmacy, sat down in the lunch department and waited to be served. All said they intended to be arrested. In each case, the manager of the store came up to them with a peace officer and asked them to leave. They refused to do so and were then placed under arrest and charged with trespass and breach of the peace. Bouie, in addition, was charged with resisting arrest. It is undenied that he resisted.

Bouie and Neal were tried on March 25, 1960, and the other Defendants on March 30, 1960, before The Honorable John I. Rice, City Recorder of Columbia, without a jury; trial by jury having been waived by all the Defendants.

All the Defendants were convicted and sentenced and these appeals followed. Motions raising the constitutional questions were timely made.

There are 16 grounds of Appeal in the Bouie and Neal proceeding and 13 grounds of appeal in the proceeding involving the other Defendants, raising the following questions: (1) Did the State deny Defendants, who are Negroes, due process of law and equal protection of the laws within the Federal and State Constitutions either by using its peace officers to arrest them or by charging them with violating Secs. 16-386 (Criminal Trespass) and 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended, when they refused to leave a lunch counter when asked by the manager thereof to do so? (Bouie and Neal Nos. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15; other Defendants, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13.) (2) Was there any substantial evidence pointing to the guilt of the Defendants? (Bouie and Neal, No. 8; other Defendants, No. 7.)

Since Defendants did not argue Bouie and Neal's Exceptions 7, 9 and 16, I have considered them abandoned.

The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State Constitutional provisions.

A lunch room is like a restaurant and not like an inn.

The difference between a restaurant and an inn is explained in *Alpaugh* v. *Wolverton*, 36 S. E. (2d) 907 (Court of Appeals of Virginia) as follows:

> "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 A. Jr., Innkeepers, No. 120, p. 623; 43 C. J. S., Innkeepers, No. 20, subsection b, p. 1169. His responsibilities and rights are more like those of a shopkeeper.

Davidson v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1919 E, 704. He is under no common-law duty to serve anyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance* v. *Mayflower Tavern Inc.*, 106 Utah 517, 150 P. (2d) 773, 776; *Noble* v. *Higgins*, 95 Misc. 328, 158 N. Y. S. 867, 868."

And the proprietor can choose his customers on the basis of color without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic Whitetower, etc.*, 181 F. Sup. 124 (Dist. Court Md.), 284 F. (2d) 746.

In the *Williams case, supra*, Judge Soper, speaking for the Court of Appeals for The Fourth Circuit, said: "As an instrument of local commerce, the restaurant is not subject to the Constitution and statutory provisions above (Commerce Clause and Civil Rights Acts of 1875), and is at liberty to deal with such persons as it may select."

And in *Boynton* v. *Virginia*, —— U. S. ——, 81 S. Ct. 182, 5 L. Ed. (2d) 206, The Supreme Court of The United States took care to state:

"Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers."

Order of the Richland County Court

I have reviewed all of the cases cited by both the City and the Defendants, and in addition have reviewed subsequent cases of the Court of Appeals and The United States Supreme Court, including the case of *Burton* v. *Wilmington Parking Authority;* handed down on April 17, 1961, and find none applicable or controlling except the *Williams* and *Slack cases, supra.*

The Defendants, under South Carolina Law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker,* 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser, and justify the owner in using reasonable force to eject him."

If the manager could have ejected Defendants himself, he could call upon officers of the law to eject them for him.

Since the Defendants refused to leave, they were criminal trespassers under Sec. 15-909 of The Code of Laws of South Carolina, 1952, and their conviction was proper.

Shelly v. *Kraemer,* 334 U. S. 1, 92 L. Ed. 345, 68 S. Ct. 836, 3 A. L. R. (2d) 441, and *Barrows* v. *Jackson,* 346 U. S. 249, 97 L. Ed. 1586, 73 Supreme Court 1031 cited by the Defendants are not in point. In both of these cases, there had been a sale of real estate to a non-caucasian in violation of restrictive covenants. In the *Shelley* case, the Court held that the equity of court of the State could not be used against the non-caucasian to enforce the covenant. In the *Barrows* case, the court held that the covenant could not be enforced by an action at law for damages against the co-covenanter, who broke the covenant.

In both of these cases, there were willing sellers and willing purchasers. The purchasers paid their money and entered into possession. Having entered, they had a right to remain.

In the cases before the Court, there were no two willing parties to a contract. True, the Defendants wanted to buy, but the storekeeper did not want to sell and the Defendants had no right to remain after being asked to leave. A white person would not have the right to remain after being asked to leave either. In either case, a person would be a trespasser. The Constitutions provide for equal rights, not paramount rights.

I have only to pick up my current telephone directory and look in the yellow pages to find at least four establishments listed under "Restaurants" that advertise that they are for colored or for colored only.

To say that a white proprietor may not call upon a policeman to remove or arrest a Negro trespasser or a Negro proprietor cannot call upon a policeman to remove or arrest a White trespasser would lead to confusion, lawlessness and possible anarchy. Certainly, the Constitutions intended no such result.

The fundamental fallacy in the argument of Defendants is the classification of the stores and lunch counters as public places and the operations thereof as public carriers.

A person, whatever his color, enters a public place or carrier as a matter of right. The same person, whatever his color, enters a store or restaurant or lunch counter by invitation.

That person's right to remain in a public place depends upon the law of the land, and in a public carrier upon such law and such reasonable rules as the carrier may make, and,

under the Constitution, neither the law nor rules may discriminate upon the basis of color.

On the other hand, the same person has no right to enter a store, a restaurant, or lunch counter unless and until invited, and may remain only so long as the invitation is extended. Whether he enters or remains depends solely upon the invitation of the storekeeper, who has a full choice in the matter. The operator can trade with whom he wills, or he can, at his own whim and pleasure, close up shop.

There is no question but that the Defendants are guilty. They were asked to leave and they refused. They, thereupon, were trespassers and such constituted a breach of the peace. In addition, Bouie admittedly resisted a lawful arrest.

The trespass statute (Section 16-386, as amended, Code of Laws of South Carolina, 1952) is not restricted to "pasture or open hunting lands" as defendants argue. The statute specifically says "any other lands". In Webster's New International Dictionary, the definition of "land" in "Law" is as follows:

> "(a) any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards. (b) An interest or estate in land; loosely any tenement or hereditament."

The statute thus applies everywhere and without discrimination as to color. There is no question but that it was designed to keep peace and order in the community.

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers

ab initio. Aside from this, however, the law is that even though a person enters property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker, supra.*

For the reasons herein stated, I am of the opinion that the judgments and sentences of the Recorder should be sustained and the Appeals dismissed, and it is so *Ordered.*

s/ JOHN W. CREWS,
Judge, Richland County Court.

Columbia, S. C.,
April 28, 1961.

Opinion of the Supreme Court of South Carolina

IN THE

SUPREME COURT OF SOUTH CAROLINA

THE CITY OF COLUMBIA,

Respondent,

—v.—

SIMON BOUIE and TALMADGE J. NEAL,

Appellants.

Appeal From Richland County
John W. Crews, County Judge

Filed February 13, 1962

AFFIRMED IN PART;
REVERSED IN PART

LEGGE, A. J.: The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March 14, 1960, and charged with trespass (Code, 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section 15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was senteneed to pay a fine of one hundred ($100.00) dollars or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentences to run con-

secutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

Eckerd's one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department.

On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested "if it took that". No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query "for what" from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that

he made no resistance, but only said to the officer when the latter had hold of his belt, "That's all right, Sheriff, I'll come on". The officer testified that Bouie said: "Don't hold me, I'm not going anywhere", and that after they had proceeded a few steps he "started pushing back and said 'Take your hands off me, you don't have to hold me.'"

The appeal here is based upon four Exceptions of which Nos. 3 and 4 present, in substance, the contention that appellants' arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial discrimination and constituted state action in violation of appellants' rights under the Fourteenth Amendment. Identical contention was made, considered, and rejected in City of Greenville v. Peterson, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——; City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) —— and City of Columbia v. Barr, filed December 14, 1961, —— S. C. ——, —— S. E. (2d) ——, in each of which was involved a sit-down demonstration, similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was Eckerd's in the case at bar. Exceptions 3 and 4 are overruled.

Exceptions 1 and 2 purport to question the sufficiency of the evidence to make out a case of trespass as to either appellant, or a case of resisting arrest as to the appellant Bouie. So far as they relate to the charge of trespass, these exceptions are without merit. The uncontradicted testimony, to which we have referred, amply supported that charge.

On the other hand, the evidence was in our opinion insufficient to warrant Bouie's conviction on the charge of

resisting arrest. It is apparent from the testimony of the arresting officer that the only "resistance" on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter "had to pick him up out of the seat". Resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it, State v. Hollman, 232 S. C. 489, 102 S. E. (2d) 873. But we do not think that such momentary delay in responding to the officer's command as is shown by the testimony here amounted to "resistance" within the intent of the law, City of Charleston v. Mitchell, supra.

The judgment is affirmed as to the conviction and sentence of each of the appellants on the charge of trespass; it is reversed as to the conviction and sentence of the appellant Bouie on the charge of resisting arrest.

Affirmed in part and reversed in part.

TAYLOR, C.J., MOSS and LEWIS, JJ., concur.

Order of Denial of Rehearing

IN THE

SUPREME COURT OF SOUTH CAROLINA

CITY OF COLUMBIA,

Respondent,

—against—

SIMON BOUIE and TALMADGE J. NEAL,

Appellants.

(Endorsed on back of Petition for Rehearing)

THE WITHIN PETITION FOR REHEARING has been carefully considered and is found to be without merit. The Petition is therefore denied.

Filed: March 7, 1962.

s/ C. A. TAYLOR C.J.

s/ LIONEL K. LEGGE A.J.

s/ JOSEPH R. MOSS A.J.

s/ J. WOODROW LEWIS A.J.